Univerzita Karlova v Praze

Právnická fakulta

Sociological aspects of the Dayton system in Bosnia and Herzegovina

Studentská vědecká odborná činnost

Kategorie: magisterské studium

2013 Tomáš Jungwirth

6. ročník

Čestné prohlášení a souhlas s publikací práce

Prohlašuji, že jsem práci předkládanou do 6. ročníku Studentské vědecké a odborné činnosti (SVOČ) vypracoval samostatně za použití literatury a zdrojů v ní uvedených. Dále prohlašuji, že práce nebyla ani jako celek, ani z podstatné části dříve publikována, obhájena jako součást bakalářské, diplomové, rigorózní nebo jiné studentské kvalifikační práce a nebyla přihlášena do předchozích ročníků SVOČ či jiné soutěže. Souhlasím s užitím této práce rozšiřováním, rozmnožováním a sdělováním veřejnosti v neomezeném rozsahu pro účely publikace a prezentace PF UK.

V New Yorku dne 28. 3. 2013

…………………………………………..

Tomáš Jungwirth

„The Western Powers intervened in Bosnia to stop a war, not build a nation. Having done the former, however, they discovered the latter insescapable.“

Christopher S. Chivvis, *The Dayton Dilemma*

Table of Contents

1. Introduction 6
2. International law in sociological perspective 6
3. Winners and losers of the Dayton Agreement 8
4. Demographic trends and multiple levels of self-identification 11
5. Attempts to attain transitional justice 14
6. Sejdić and Finci case and human rights 17
7. Conclusion 19
Bibliography 21

1. Introduction

General Framework Agreement for Peace in Bosnia and Herzegovina signed in Dayton, Ohio by presidents Izetbegović, Milosević and Tudjman nearly eighteen years ago embodies one of the most remarkable interventions of the international community into the internal affairs of a *de jure* sovereign state in the past decades. At the same time, it marks the end of the bloodiest armed conflict in Europe since World War II. The rather unprecedented arrangement it has established, has for years been in the center of attention of many domestic and international scholars. Yet, the issue remains pressing as Bosnia currently finds itself at historical crossroads.

This paper attempts to review the topic from a somewhat novel perspective. Presupposing the reader's knowledge of the essential aspects of the Dayton Agreement, it focuses on the social perception of the Dayton system[1], relying to a greater extent on an analysis of the various national narratives present within Bosnia's society. In a broader sense, it aims to make use of the Bosnian case in order to reveal some of the challenges faced by the international community when searching for solutions to end a violent ethnic conflict and establish a transitional régime which would then prospectively transform into a social *status quo*.

The structure of this paper is rather straightforward. The first substantive chapter serves as a bridge between sociological understanding of international law (in itself a topic yet to be thoroughly explored in literature) and the specific case of Bosnia and Herzegovina. The following chapters then deal with several selected broader socio-legal issues inherent to the Bosnian case. Based on the undertaken analysis, a conclusion is crafted, reviewing the current perspectives of the Dayton system and summarizing the lessons learned for future international engagement in complex situations of ethnic conflict.

2. International law in sociological perspective

---

[1] Within the context of this paper, this term shall be understood as a „legal web" (term used in Paolo Gaeta, „The Dayton Agreements and International Law", *EJIL,* 7/1996, p. 149), encompassing the General Framework Agreement, its twelve annexes (including the new Constitution of Bosnia and Herzegovina), the mandate of the High Representative, the specific obligations of the Federal Republic of Yugoslavia and Croatia, the impact of ICTY and other relevant international institutions and organizations, and other related aspects.

Each normative system requires an examination as to how it is being reflected by its subjects in the course of time. If a system is to be functional, it is essential that its rules are respected and deemed binding by their recipients. Whether they shall do so because of their internal motives or in reflection of fear of external repression is for the needs of this paper irrelevant.

Unlike domestic law whose imminent recipients are overwhelmingly individuals, international public law on the general level targets states, international organizations and other specific subjects. 20th century developments leading to the upswing of humanitarian law and human rights law have had a great impact on the sociological orientation of international law.[2] Nevertheless, state-centrism and principle of state sovereignty remain the central definition characteristics of international law in the Westphalian system.[3] The contact of international law with the individual as a component of the society thus remains *ipso facto* mediated which however does not imply that it would be insignificant. The state entity defined in a broader sense through its domestic political reality, can be labeled as the intermediary of such contact.

Let us bear in mind that in order to fulfill its role of the initiator of social change, no branch of law can be required to correspond strictly with the „sociological substratum“[4] as if it were, it would lose its normative character.[5] But at the same time, as argued by Max Huber a century ago, effective international law can neither become overly distant from the underlying societal base.[6]

The political elites holding prominent public offices are thus on one hand called to action by international law while on the other hand constituted by the momentary public demand. This gives rise to tensions. Even though states are *a priori* inclined towards obeying international law[7], if a critical discrepancy occurs between its demands and its societal acceptance, it necessarily results in a culminating dilemma of the political elites

[2] In the mid-20th Century, Wilfred Jenks presented an argument that despite the state being the primary subject of international law, it often goes beyond the framework of state interests and deals with humanity in a broader sense. On the contrary, Julius Stone is of the opinion that because of the existence of state entities, fundaments of the sociological substratum are inaccessible to international law. In Muruga P. Ramaswamy, „Sociological Orientation of International Law?“. *The International Journal of Interdisciplinary Social Sciences*, Vol. 5, 2011, pp. 34-37.

[3] Sociological Orientation, p. 31.

[4] Julius Stone uses this term as encompassing social, political, economic and psychological facts. Ibid., p. 32.

[5] Jost Delbrück, „Max Huber's Sociological Approach to International Law Revisited“. *EJIL*, 18/2007 , p. 112.

[6] Max Huber, „Die soziologischen Grundlagen des Völkerrechts“. Published in Klein; Kraus (eds.), *Internationalrechtliche Abhandlungen*, 1928, pp. 104-105.

[7] A particularly interesting critique of this *prima facie* straightforward premise is to be found in Goldsmith; Posner, *The Limits of International Law.* Oxford University Press, 2005, pp. 9-17.

which in the longer term can not but lead to the violation of state's international obligations.

For the examination of our case, it is thus crucial to ask, onto which level did the legal régime established by the discontinue ingerence of international law in the form of the Dayton Agreement correspond with the current and long-term sentiments of the dominant segments of Bosnia's society. Provided that this régime, relying on a variety of legal and other relevant tools, was unable to at least a minimum acceptable level meet the required social *status quo* – if such is in the given situation at all conceivable – we could not but pronounce the occurrence of a situation described in the previous paragraph and thus an overall failure of one of the boldest and most radical interventions of the international community to state sovereignty in the history. In such case, only a principal change to the existing political and legal régime, conducted either with the consent or against the will of the international community, could serve as a solution ruling out the possibility of a complete breakdown of key public institutions.

However, it stems clearly from the context that none of the main architects of the Dayton system presupposed its timely and smooth implementation. That is also why it has received a firm backing of the international community whose pressure should have helped overcome the initial difficulties in the implementation of this – to a large extent imposed – system. A comprehensive understanding of the current perspectives of the Dayton arrangement needs to rely on the reflection of the critical domestic socio-political developments since 1995.

3. Winners and losers of the Dayton Agreement

It is without doubt that the Dayton system represents a discontinuous historical moment. Such moments can usually be found in situations of internal revolutions or substantial external ingerences based on the unfavourable outcome of an armed conflict or other form unsustainable pressure. In the former case, the new arrangement reflects the will of dominant segments of the society and is thus at the given time and in the given place desirable. To the contrary, the evaluation of the latter situation must rely on a premise that the new arrangement is not socially preferable and is thus imposed. Cases of the treaties of Versailles and Trianon or the Munich Agreement demonstrate that if

the dissonance between an international law instrument and the sociological substratum is present to a large extent, not even the use of a number of oppressive measures for its enforcement can give rise to a social *status quo*. Whether this is the case of Dayton shall be hinted via the analysis of its interpretations by its respective recipients.

Despite the fact that the Dayton Agreement may have in effect given way to the dissolution of the country, its most optimistic interpretation is to be heard from the Bosnian Muslims. The country for which's integrity and sovereignty they fought, did indeed remain in existence in the post-Dayton era – if only in the formal sense. Bosniaks represent the most numerous nation, execute political control over the capital and none of their highest-ranked representatives have been convicted for war crimes. In the course of the war, they became the victims of a Serbian aggression and their struggle is most often considered just and legitimate. Until today, they therefore enjoy most of the sympathies of the Western countries.

In the perspective of the representatives of Republika Srpska, the Dayton Agreement is far from the desired result of the conflict. Even though the Bosnian Serbs have been awarded their own „entity", their initial ambition was acquiring most of Bosnia's territory and the creation of the so-called Greater Serbia.[8] The successes of the first war years did, in fact, hint to the feasibility of such plan. Also, nearly all the other proposed peace settlements prior to Dayton were more favourable to the Serbs.[9] In fact, Bosnian Serbs apparently missed the right moment for the acceptance of a favourable peace deal. Instead, through committing ever more widespread war crimes, they lost all remaining credibility as negotiation partners. Ironically, the Dayton Agreement was eventually imposed on the Bosnian Serbs with the help of their former sponsor Slobodan Milosević whose support for the separatist tendencies of Republika Srpska became untenable in the light of harsh international sanctions.[10] The Bosnian-Serbian elites were made stand trial in the Hague and banned from any further engagement in the public life. Needless to say, throughout the whole Serbian nation, a defeatist resentment is present as a result of the lost war for national unification which caused irreparable harm to both Serbian

[8] See Stephen Engelberg, „Carving out a Greater Serbia". *The New York Times,* 1. 9. 1991.
[9] Compare Carrington-Cutileiro plan, Vance-Owen plan, Owen-Stoltenberg plan, Contact Group Plan.
[10] See UNSC Res 757 (30. 5. 1992), UN Doc S/RES/757.

society and economy. The factual loss of Kosovo, until recently hardly imaginable, may be seen as only the last straw.

The situation of the Croatian nation in Bosnia is ambivalent and in some respects close to schizophrenic. The establishment of Bosniak-Croat federation[11] helped their motherland regain the occupied territories of the Republic of Serbian Krajina. Given the proportional representation of Croats within the Bosnian society, the Dayton arrangement appears to be rather favourable as it guarantees the Croats particular rights nearly equivalent to those of the two dominant nations. This conditional sacrifice of the vision of connecting the Croat part of Bosnia to Croatia or at least creating a third intra-state entity should however not be viewed as an overall resignation of the society on such ambitions. A significant part of Bosnan-Croatian population still refuses to see the present setting as final.[12]

Regardless of the technical aspects of the peace of Dayton, it is possible to identify its primary emotional winner (Bosniaks) and loser (Serbs). Although Dayton treaties and all that accompanies them may appear as a compromise to an independent observer, significant parts of Bosnian society perceive them rather as a dictate of the global powers. This fact inherently determines further socio-political developments. The Serbian nation has in the post-war years been defined mostly be the omnipresent nationalism stemming from the sense of grave injustice. In the perception of dominant parts of the Serbian society, Bosniaks, similarly to e.g. Albanians have become what Carl Schmitt defines as *political enemy*.[13] Their existentially understood distinctions lead to the consideration of the inter-ethnic conflict as being historically determined and impossible to suppress by any normative system. Certain effects of that on the everyday social and political life of Bosnia and Herzegovina are being analyzed in the next chapters.

---

[11] Washington Agreement between Bosnia and Herzegovina and Croatia from 1. 3. 1994.

[12] Note in this context that several of the past peace proposals were even more favourable to the Croats, anchoring the creation of an independent Croat entity or autonomous districts. See Carrington-Cutileiro plan, Vance-Owen plan, Owen-Stoltenberg plan, Contact Group plan. We shall also recall that Bosnian Croats have a short history of independent statehood in the form of Republic of Herzeg-Bosnia, in existence between 1991 and 1994, abandoned by the Washington Agreement. See Bethlehem; Weller, *The Yugoslav Crisis in International Law*. Cambridge University Press, 1997, p. LIV.

[13] „The political enemy (...) is the other, the stranger; and it is sufficient for his nature that he is, in a special intense way, existentially something different and alien, so that in the extreme case conflicts with him are possible. These can neither be decided by a previously determined general norm nor by the judgment of a disinterested and therefore neutral third party," writes Schmitt with a hint of scientific simplification and – indeed – fatalism in 1932, already. See Carl Schmitt, *The Concept of the Political*. The University of Chicago Press, 2007, p. 27.

4. Demographic trends and multiple levels of self-identification

A majority of existing topic-related literature takes a rather uncritical notion of the construction of the three constituent nations, embedded in the Constitution (Annex IV of the Dayton Agreement). Even authors who tend to condemn the current system for its discriminative character often perceive the division into three nations and „Others“ as an innate characteristics of the post-war Bosnian society.[14] They thus inadvertently undertake a mental shortcut based on the historical experience with the Balkan peninsula nations. The repetition and underlining of this mental shortcut in both domestic and international contexts, however, appears to be resulting in its ever-louder rejection by the very people it attempts to identify.

Every citizen of Bosnia and Herzegovina is entitled to a choice of their own nationality which then projects into their specific political rights. Indeed, if instead the innate characteristics were determinative, the constitutional system of Bosnia and Herzegovina would certainly be facing an overwhelming critique for anchoring ethnic discrimination.[15] It is nevertheless a matter of fact that national categories are in the Balkan states often based on certain objective criteria reflecting historical experience. Unlike Western European cultural nationalism, in this region a so-called ethnic nationalism or ethnonationalism[16] is present, defined by the supremacy of the right of a nation to self-determination over the right of an individual to self-determination.[17] The Dayton system in fact all but presupposes Bosnia stepping out of this undesirable scheme in the direction of a modern, citizen-based understanding of a nation.

Let us have a short glance on what national groups have the inhabitants of Bosnia and Herzegovina identified with in the past decades. While Bosniaks (prior to 1994 called Muslims) encountered over 30% population increase between 1961 and 1991, Serbs and Croats have in the same period lost around a quarter members. Even more striking is that a substantial number of persons have identified with the Yugoslav nationality,

---

[14] Not even the ECtHR in its Sejdic and Finci ruling condemn the concept of Constitutive nations as such and thus indirectly accepted that national categories still have a role to play in the Bosnian political system. It formulated a requirement focusing solely on ensuring non-discriminatory access to certain elected functions but did not make an articulated call for the abandonment of the sophisticated minority quotas system. See International Crisis Group, *Europe Briefing No. 68: Bosnia's Gordian Knot: Constitutional Reform.* Sarajevo/Istanbul/Brussels, 2012, p. 6.

[15] Compare, International Convention on the Elimination of All Forms of Racial Discrimination, 21. 12. 1965, Art. 1(1).

[16] A concept thoroughly explored in Asim Mjukić, *We, the Citizens of Ethnopolis.* Sarajevo, 2008.

[17] Michael W. Waithmann, *Balkán: 2000 let mezi Východem a Západem*. Vyšehrad, 1996, p. 185.

hence reflecting Tito's claim of „brotherhood and unity".[18] This one is naturally no longer reflected in the post-Dayton categories. Even though in relation to the outbreak of war many persons returned to traditional national affiliations, fresh data may suggest that the division on three constituent nations and „Others" is becoming overcome in practice.

In Bosnia, neither the passive nor the active suffrage are strictly based on the nationality indicated in a census.[19] Hence, candidates can run for office and voters cast their ballots in defiance of the very principles of the Dayton Agreement. The voters or the nominees in such case willingly abandon their national category. In practice, Zeljko Komsic was elected as the Croat member of the Presidency in the last two elections only because of the ballots of moderate Bosniaks.[20] Certain parties also misuse the quotas for „Others" while rallying behind candidates who purposefully refuse to identify with any of the three main nations.[21] In effect, the elected politicians commonly represent the interests of a part of the electorate distinct from the one which is constitutionally entitled to the seat. Could it be that the systemic failures we have just mentioned do not only reflect a flawed transposition of the Dayton Peace Agreement but also foresee structural demographic changes?

The first regular census in 22 years which should take place in 2013 will provide valuable data in this regard. At the end of 2012, a test census was carried out. According to the media reports, up to 35% of mainly young people should have filled in the „nation" category with „Bosnian", thus in effect voluntarily associating themselves with the „Others" [22] - a category which in the perception of the Dayton arrangement should have encompassed only a small number of minority nationals.[23] If the regular census confirms the trend of rising identification with this citizenship-based nationality

[18] See complex table reflecting data from 1961 to 1991, available online: http://www.fzs.ba/Dem/Popis/NacStanB.htm

[19] Such a rule exists e. g. in South Tyrol, Bosnia's Gordian Knot, pp. 11-12.

[20] Within the Federation, one Bosniak and one Croat need to be elected. The voters are without further requirements expected to vote for a representative of their nation. See T. J., „Bosnia's election: Give them a break", *The Economist*, 4. 10. 2010.; Toby Vogel, „Moderate Muslim elected to Bosnian presidency", *European Voice,* 4. 10. 2010.

[21] This situation naturally denies the very aim of the quotas – i.e. to ensure proper representation of minority nationalities. Instead, political parties are allowed to gain „cheap" seats. See. Bosnia's Gordian Knot, pp. 11-13.

[22] The authorities refuse to provide any information related to the test census. The given number therefore should be addressed as a media speculation – the real percentage may be significantly lower. See Elvira M. Jukić, „Proud to be Minced Meat in Bosnia". *Balkan Insight*, 23. 11. 2012.

[23] There are currently 17 certified national minorities in Bosnia and Herzegovina, including the Czech one. Their overall numbers do not exceed a few percent. See Law on National Minorities, adopted on 12. 4. 2003, No. 12/03. Translation available online: http://www.advokat-prnjavorac.com/legislation/LAW_ON%20RIGHTS_OF%20NATIONAL_%20MINORITIES_BOSNIA.pdf.

(regardless that those would be in majority persons sharing the Bosniak view of Bosnia as a integral state), it would mean that the Dayton principles are growing obsolete and for a significant part of the society simply unacceptable.[24]

The other problematic aspect of an artificial fragmentation of the society into Bosniaks, Serbs, Croats and „Others“ is that it presupposes the national identification to be superior to all other thinkable social entities. Whereas in Bosnia, nationality nearly unconditionally correlates with confession[25] the same can naturally is not and can not be entirely true with regard to the preference of political ideology. The constitution-based central elected bodies are composed of a relatively small number of seats. Taking into account that the redistribution of these reflects national quotas, it brings us to the conclusion that the level of representativeness of the elected parties and persons is extraordinarily low.[26]

The nationally-defined political system at the same time *ipso facto* gives way to the emergence of monoethnical political parties rather than wide-reaching parties relying on a traditional political ideology, which would serve as a counter-balance to radical nationalistic forces.[27] The only relevant party capable of keeping a multiethnic character in the long term and rejecting a nationalistic rhetoric, is the SDP – social democrats.[28] Unfortunatelly, under the leadership of Zlatko Lagumdzija, this promising political grouping untertook a number of controversial steps including a problematic draft amendment to the Constitution[29] and many of its prominent representatives turned their backs to it, including above-mentioned Komsic.[30]

The war-fueled animosities between the nations of Bosnia and Herzegovina have by the end of 1995 lead to an unequivocal request for anchoring collective rights which would ensure a thorough procedural protection against possible future policy of discrimination conducted by either one of the other nations. In the given context, this could have been

[24] See Bosnia's Gordian Knot, p. 13.
[25] See e. g. data provided by CIA Factbook, available online: https://www.cia.gov/library/publications/the-world-factbook/geos/bk.html.
[26] The Croats, for instance, are regularly represented by only two rather similar political parties: HDZ and its sister HDZ 1990.
[27] It is worth noting that this system is not merely an unintentional side-effect of the Western countries' intervention but rather a heritage of the typical Balkan ethnonationalistic approach which considers an ethnically homogenous community to be a *per se* universal political entity. See Bedrudin Brljavac, „Bosnia between ethnic-nationalism and Europeanization“, *Open Democracy*, 30. 11. 2011.
[28] Bosnia's Gordian Knot, p. 13.
[29] Elvira M. Jukić, „Bosnia to Miss EU Deadline on Court Ruling. *Balkan Insight,* 17. 8. 2012.
[30] See an insightful commentary of an American diplomat, William A. Stuebner, „ Bosnia's SDP Sold Out to Forces of Darkness“, *Balkan Insight*, 13. 9. 2013.; and an article on the criticized deal with Dodik's SNSD, see Elvira M. Jukic, „Bosnia Leaders Hatch Deal On Vital Issues", *Balkan Insight*. 1. 11. 2012.

tabled as a *conditione sine qua non* for any positive negotiation outcome and was hence agreed to by the negotiators who might have been well aware of how problematic this solution in fact was.

From the historical perspective, Bosnia and Herzegovina does not fit into the scheme of a nation state as it had developed in Europe in the past centuries. Definition of the terms „nation“ and „citizenship“ and the outlining of their interdependence in this case requires a multi-disciplinary analytical approach and their artificial schematization in the Dayton Agreeement appears untenable. Only a contextual understanding can serve as a basis for such transposition of the topic into legal norms which will provide respect for human rights and yet stabilize the society.[31]

In any case, it is not wholly unlikely that it the upcoming years, we will encounter a certain spontaneous retreat from nationalistic positions for the sake of ensuring sustainable development of Bosnia and Herzegovina as a common home for all its citizens. Despite the fact that Dayton Peace Accords are in many aspects a tool of both legitimization and legalization of ethnonationalism, young generations may apparently be opening up to the idea of sacrificing the sense of

belonging in exchange for a viable perspective of economic and political progress. Nation may not be the only thinkable superior identification entity for an increasing part of the society anymore. Unfortunately, the political climate in the country is yet to lean towards such change of paradigm and the legislators's ability to reflect the eventual transformation in a constitutional amendment also seems very much in doubt.

5. Attempts to attain transitional justice

The International Criminal Tribunal for Former Yugoslavia (ICTY) has had an extraordinary impact on the Bosnian society. Despite being established more than two years before the adoption of the Dayton Agreement, ICTY needs to be perceived as an integral part of the Dayton régime as it is closely interlinked with its other provisions. In our analysis of this institution, we will however not address specific legal issues raised by the numerous cases. Instead, let us view the ICTY from a broader perspective as a

[31] See Erdar Sarajli, *A Citizenship Beyond the Nation-State: Dilemmas of the ‚Europeanisation' of Bosnia and Herzegovina*. University of Edinburgh, 2010.

cornerstone of international community's efforts for the implementation of transitional justice. A particular interest will be given to the relationship between ICTY and the domestic institutions as well as to the reflection of tribunal's work by Bosnian society.

Transitional justice is a term which is yet to be fully embedded in the Czech academic discourse. There is even a lack of consensus on its correct translation into the Czech language. In any case, within the context of the former Yugoslavia, this concept has been for some time already playing a prominent role. It has been established at the turn of the 80's and 90's as a „response to systematic or widespread violations of human rights. It seeks recognition for victims and promotion of possibilities for peace, reconciliation and democracy. Transitional justice is not a special form of justice but justice adapted to societies transforming themselves after a period of pervasive human rights abuse."[32] Transitional justice attempts to pursue a holistic approach and relies on tools such as criminal prosecution of perpetrators, establishment of truth and reconciliation commissions, victim redress, creation of memorials and museums. Transitional justice is being ever more embedded in international law, be it via landmark decisions of supranational human rights mechanisms[33] or through the establishment of international penal institutions – in the past years notably the International Criminal Court.

The establishment of ICTY was envisaged by Security Council resolution 808 from February 1993[34], the final decision was made in resolution 827[35] adopted on 25 May that year. It is the first international body prosecuting crimes under international law since the military tribunals in Nuremberg and Tokyo. Unlike these two, ICTY was not created *ex post* but instead during the still existent armed conflict. Both resolutions 808 and 827 explicitly presuppose that the creation of the tribunal would lead to the end of violence and restoration and maintenance of peace in the region.[36] The ICTY is an institution based on the invocation of chapter VII of the Charter[37] and therefore functions as a temporary body which's lifespan is derived from the existing threat to international peace and security.[38] For these reasons, it should indeed be perceived not

[32] International Center for Transitional Justice, *What is Transitional Justice?* ICTJ, 2009.
[33] See e.g. *Velasquez Rodriguez Case*, IACtHR (Judgment), 29. 7. 1988.
[34] UNSC Res 808 (22. 2. 1993), UN Doc S/RES/808.
[35] UNSC Res 827 (25. 5. 1993), UN Doc S/RES/827.
[36] UNSC Res 808, preambular paragraph 9; UNSC Res 827, preambular paragraph 6.
[37] UNSC Res 827, preambular paragraph 11.
[38] UN Charter, 24. 10. 1945, 1 UNTS XVI, Art. 39. Originally, ICTY was expected to prosecute a small number of strategic cases within 3-5 years. See Richard A. Wilson, *Writing History in International Criminal Trials*. Cambridge, 2011, p. 25.

only as a specific judicial body but also as a substantive component in the range of diplomatic, legal and military tools aiming to deter the parties to the conflict from committing any further crimes and to restore the rule of law – i.e. precisely as an instrument of transitional justice. This changes nothing on the fact that the efforts for attaining transitional justice also represent an extensive experiment in social engineering[39] without any foreseeable result. It is thus questionable whether the initial expectations of this international tribunal were at all realistic.

The Tribunal's influence on the domestic judiciary reform can despite all setbacks be considered positive.[40] The critical question remains, whether and to which extent did this affect its public image. A survey carried out in 2005 observed ICTY's perception among the respective nations on a sample of approx. 2500 respondents. There, 52% of Bosniaks fully agreed that the Tribunal is a precondition for a just peace and normal relations while only 18% Croats and less than 5% Serbs shared this view. By contrast, 54% of Serbian respondents fully agreed with a statement that the ICTY is primarily a politicized court and as such an obstacle to the stability in the region – an opinion shared by 30% Croats and only 10% Bosniaks.[41] Some comfort may have been drawn if we took for granted that the Tribunal always decided lawfully and impartially. However, two decisions from 2012 suggest that it is not so. The cases of Gotovina and Markač[42] as well as Haradinaj, Balaj and Brahimaj[43] painfully demonstrate the Tribunal's inability to become an effective tool in the hands of international justice.[44] To many, after nearly two decades of its existence, the ICTY ever more resembles an instrument of anti-Serbian vengeance.[45] As such, it does an ill-service to the very people who share anti-Serbian sentiment.

In 2004-5, Srebrenica and several other Bosnian War crime sites witnessed a series of conferences organized by ICTY Outreach Programme, an office established at the end of

---

[39] Roland Paris, *At War's End, Building Peace After Civil Conflict*. Cambridge University Press, 2004.

[40] William W. Burke-White, *The Domestic Influence of International Criminal Tribunals*. University of Pennsylvania, 2007, p. 3.

[41] See complete chart including further data, in Roland Kostić, *Ambivalent Peace: External Peacebuilding Threatened Identity and Reconciliation in Bosnia and Herzegovina*. Uppsala, 2007, p. 323.

[42] *Prosecutor v. Gotovina and Markač* (Appeals Chamber Judgment), ICTY Case IT-06-90-A.

[43] *Prosecutor v. Haradinaj, Balaj and Brahimaj* (Retrial Judgment), ICTY Case IT-04-84*bis*-T.

[44] An accurate summary of controversies raised by decisions in these cases can be found in a short article by Veronika Bílková. See Veronika Bílková, „Balkánská (ne)spravedlnost?", *ČSMP-CSIL,* 10. 12. 2012. With regard to the Gotovina case, the ICTY Prosecutor Serge Brammetz claimed on 2. 3. 2013 at Harvard: „If I am to choose one decision which will be difficult to live with, it would be this one. (...) The Tribunal intended to acquit Gotovina at any price. (...) It was the first time I have handed the Court my written statement to the judgment."

[45] Although certain scholars oppose the perception of ICTY as a „victor's justice", e.g. Richard A. Wilson, *Writing History in International Criminal Trials.* Cambridge, 2011, p. 31.

the 90s in reflection of the Tribunal's low popular credibility. The aim of these conferences was to belatedly enter into dialogue with the victims. Instead, they rather served as a venue for the victims' ideological opponents to loudly object to the proven facts and, in effect, the conferences merely underlined the contrast between the historical truth in the interpretation of the ICTY and the local communities. [46] This case shows that the completely incpompatible perception of the past events, the consideration of one's nation as a primary victim and the omnipresent relativization of wrongs committed on the members of other nations constitute the social reality of Bosnia and Herzegovina even 18 years from cease-fire. A successful application of transitional justice presupposes that the revelation of historical truth[47] and convicting certain prominent criminals will give way to abandoning the principle of collective responsibility and to inter-ethnic reconciliation. In reality, it appears that instead of an unification or an approximation of the national narratives, the ICTY rather contributed to the cementing of ethnically defined political positions.[48] This certainly represents one of the most dangerous factors for the future viability of the Dayton system.

6. Sejdić and Finci case and human rights

The Dayton treaties have faced critique for legalizing human rights violations from the very beginning.[49] However, a truly visible demonstration of that has emerged only fourteen years after their adoption in the form of an European Court of Human Rights decision in the case of Sejdić and Finci against Bosnia and Herzegovina.[50] The case was based on complaints of two men of Roma and Jewish origin against their ineligibility to stand for office in the Presidency of Bosnia and Herzegovina and/or the House of Representatives. It appears that the Constitution of Bosnia and Herzegovina has (because of its reference to international human rights instruments and most notably

[46] Perpetrators and Victims: Local responses to the ICTY, p. 57.
[47] Historical truth, meaning „negative truth", i.e. defiance of lies. See Johanna M. Selimović, „Perpetrators and Victims: Local responses to the ICTY", *Journal of Global and Historical Anthropology,* 57, 2010, p. 56.
[48] Perpetrators and Victims: Local responses to the ICTY, p. 51.
[49] M. Tomić-Malić, *Dayton Peace Agreement: Four Years of Experience - Position of the Democratic Alternative*. BiH Roundtable, Sarajevo, 2000, p. 8. Even the Committee against Torture and the Human Rights Committee urged for change. (Sejdić Finci, para. 19).
[50] *Sejdić and Finci v. Bosnia and Herzegovina*, ECtHR App. nos. 27996/06, 34836/06 (Judgment), 22. 12. 2009

the direct applicability of the European Conventon of Human Rights[51]) always been a self-contradictory document.

Nevertheless, the Grand Chamber of the Court has not gone as far as to condemn the Dayton system as a whole. Instead, it recalled the mediators' intentions for the Convention to become a „dynamic instrument" and for the discriminatory measures to be later removed.[52] The Court reflects on the relevant articles in the light of the past years' development with an accent on the perception of the issue by relevant international organizations. It rejected the Bosnian Government's argument that „the time was still not ripe for a political system which would be a simple reflection of a majority rule"[53], with a reference to the opinion of the Council of Europe's Venice Commission that alternative mechanisms of power-sharing exist which would not constitute an irremovable obstacle in citizen's access to elected offices.[54] In conclusion, by a majority vote, it found a violation to the prohibition of discrimination (in the case of House of Representatives in connection with right to free elections, in the case of the Presidency as a self-standing right[55]).

The Sejdić-Finci case is indeed breakthrough but naturally does not tackle all the important human rights challenges the country is facing – most notably concenring further generations of human rights. The Constitution itself refers to the applicability of a number of other international documents protecting economic, social and cultural rights and Bosnia and Herzegovina is a full state party to CESCR, CERD, CRC, CEDAW and 77 ILO Conventions. This developing country[56] is unable to stand up to such high standards of protection in practice, though. Adopting varying legislative measures on the level of the Federation and the Republika Srpska represents a specific issue. But even in the case of existent harmonized legislative or unifying court practice, its implementation and enforcement are insufficient.[57]

---

[51] However, Bosnia and Herzegovina became a member state of the Council of Europe and thus a state under the jurisdiction of the ECtHR only in 2002. Along with its admission, it has committed itself to undertake constitutional revision with the support of the Venice Commission. For an analysis of relevant CoE mechanisms, see Adéla Kábrtová, „Transitional justice and the Council of Europe – a special emphasis on the Sejdic and Finci case", in *International Journal of Rule of Law, Transitional Justice and Human Rights*. Vol. 2, Sarajevo, 2011.

[52] Sejdić Finci, para. 14.

[53] Ibid., para. 34.

[54] Sejdić Finci, para. 48.

[55] Sejdić Finci, paras. 50, 56.

[56] See a World Bank list of developing countries. Available online: http://data.worldbank.org/about/country-classifications/country-and-lending-groups.

[57] See Mehmedić; Izmirlija; Madacki (eds.), *Human Rights in Bosnia and Herzegovina*. Sarajevo, 2012, p. 16 (right to work), p. 42 (social security), p. 54 (protection of family).

7. Conclusion

It stems from the undertaken analysis that the biggest society-related flaw in the Dayton system is its ethnopolitical approach. Although human rights of individuals are protected under the constitution and elections are being held regularly, Bosnia can hardly be considered a liberal democracy. For one, the guaranteed individual rights are in direct contradiction with the inherent limits of its political system, as confirmed by the European Court of Human Rights. Further, the principle of vested national interests is the prominent one within the Dayton system, creating a critical obstacle on Bosnia's path towards the establishment of a citizen-based state. The ethnopolitical régime did not erode in time – on the contrary, it has taken roots and conserved itself against any substantive change.

The international community has indeed been wrong in assessing that the nation-based system is only provisional and a true democracy will rise from the ashes. Under the very rules it established, it is extremely difficult to dismantle the Dayton political setup (unless there were a truly cross-cutting social consensus which cannot be reasonably foreseen). Despite the European Union and other actors putting immense pressure on Bosnia's politicians, a real constitutional reform is not within sight.[58]

There are a number of cases of so-called frozen conflicts in the world, such as in Cyprus or Transnistria, which the international community repeatedly attempted to resolve. It is without doubt that the situation in such regions is far from the desired state. However, for various external and internal reasons, these cases have emerged into a certain *status quo* which is not likely to be challenged in the near future. By contrast, the author's assessment of Bosnia's case relies on the premise that Bosnia and Herzegovina does not fall within the category of a frozen conflict. Its institutional framework and political environment have proven to be unstable in the long term, among other things due to miscalculation of the societal reflection of the Dayton régime. As this system currently meets its limits, certain substantive transformation of Bosnia's political system can be expected to happen in the near future. What form will it take on, however, is difficult to predict. It is unfortunate that such change will emerge in the context of a deeply divided

[58] See European Commission, Joint Conclusions from the High Level Dialogue on the Accession Process with Bosnia and Herzegovina, MEMO/12/503, 27. 6. 2012; Elvira M. Jukic, „EU Demands Bosnia Ethnic Rights Solution". *Balkan Insight,* 11. 2. 2013.

society which the Dayton system helped create and which all but hints to a consensual transformation.[59]

The case of Bosnia and Herzegovina reveals the failure of the international community to appropriately tackle the underlaying social sentiments and make a serious effort towards reconciliation. Is shows the apparent setback of transitional justice in its inability to offer an understanding of the various contradicting narratives and accept the notion of multiple historical truths.[60] The urge of the international community for peace in Bosnia was so strong that it would accept even a flawed and hardly sustainable one. In any of its future engagements in cases of ethnic or inter-religious conflict, the international community would be wise to keep the Bosnian case in mind. A comprehensive understanding of the sociological substratum should become a precondition for any political action aiming on the creation of a peaceful and truly democratic society.

[59] See recent statements by Milorad Dodik, president of Republika Srpska. Bojana Barlovac, „Dodik: Republika Srpska Will Be Independent“. *Balkan Insight,* 5. 10. 2012.

[60] Speech of Elazar Barkan, professor of international relations at Columbia University, given on 26. 2. 2013 at Cardozo Law School within the Deconstructing Prevention conference.

Bibliography

Monographs

Bethlehem; Weller, *The Yugoslav Crisis in International Law*. Cambridge University Press, 1997

William W. Burke-White, *The Domestic Influence of International Criminal Tribunals*. University of Pennsylvania, 2007

Roland Kostić, *Ambivalent Peace: External Peacebuilding Threatened Identity and Reconciliation in Bosnia and Herzegovina*. Uppsala, 2007

Goldsmith; Posner, *The Limits of International Law.* Oxford University Press, 2005

Mehmedić; Izmirlija; Madacki (eds.), *Human Rights in Bosnia and Herzegovina*. Sarajevo, 2012

Asim Mjukić, *We, the Citizens of Ethnopolis.* Sarajevo, 2008

Roland Paris, *At War's End, Building Peace After Civil Conflict*. Cambridge University Press, 2004

Erdar Sarajli, *A Citizenship Beyond the Nation-State: Dilemmas of the ‚Europeanisation' of Bosnia and Herzegovina*. University of Edinburgh, 2010

Carl Schmitt, *The Concept of the Political*. The University of Chicago Press, 2007

M. Tomić-Malić, *Dayton Peace Agreement: Four Years of Experience - Position of the Democratic Alternative*. BiH Roundtable, Sarajevo, 2000

Michael W. Waithmann, *Balkán: 2000 let mezi Východem a Západem*. Vyšehrad, 1996

Richard A. Wilson, *Writing History in International Criminal Trials*. Cambridge, 2011

Academic articles

Veronika Bílková, „Balkánská (ne)spravedlnost?", *ČSMP-CSIL,* 10. 12. 2012

Jost Delbrück, „Max Huber's Sociological Approach to International Law Revisited". *EJIL*, 18/2007

Paolo Gaeta, „The Dayton Agreements and International Law", *EJIL,* 7/1996

Max Huber, *Die soziologischen Grundlagen des Völkerrechts.* Publikováno v Klein; Kraus (eds.), *Internationalrechtliche Abhandlungen*, 1928

Christopher C. Chivvis, „The Dayton Dilemma". *Survival,* vol. 52, No. 5, 2010

International Crisis Group, *Europe Briefing No. 68: Bosnia's Gordian Knot: Constitutional Reform.* Sarajevo/Istanbul/Brussels, 2012

Adéla Kábrtová, „Transitional justice and the Council of Europe – a special emphasis on the Sejdic and Finci case", in *International Journal of Rule of Law, Transitional Justice and Human Rights*. Vol. 2, Sarajevo, 2011.

Eszter Kirs, „Limits of the Impact of ICTY on the Domestic Legal System of Bosnia and Herzegovina", *Goettingen Journal of International Law,* 3, 2011

Muruga P. Ramaswamy, „Sociological Orientantion of International Law?". *The International Journal of Interdisciplinary Social Sciences*, Vol. 5, 2011

Johanna M. Selimović, „Perpetrators and Victims: Local responses to the ICTY", *Journal of Global and Historical Anthropology,* 57, 2010

<u>Journalistic articles</u>

Bojana Barlovac, „Dodik: Republika Srpska Will Be Independent". *Balkan Insight,* 5. 10. 2012

Bedrudin Brljavac, „Bosnia between ethnic-nationalism and Europeanization", *Open Democracy*, 30. 11. 2011

Stephen Engelberg, „Carving out a Greater Serbia". *The New York Times,* 1. 9. 1991

International Center for Transitional Justice, *What is Transitional Justice?* ICTJ, 2009

T. J., „Bosnia's election: Give them a break", *The Economist*, 4. 10. 2010

Elvira M. Jukić, „Bosnia Leaders Hatch Deal On Vital Issues", *Balkan Insight*. 1. 11. 2012

Elvira M. Jukić, „Bosnia to Miss EU Deadline on Court Ruling. *Balkan Insight,* 17. 8. 2012

Elvira M. Jukić, „EU Demands Bosnia Ethnic Rights Solution". *Balkan Insight,* 11. 2. 2013

Elvira M. Jukić, „Proud to be Minced Meat in Bosnia". *Balkan Insight*, 23. 11. 2012

Toby Vogel, „Moderate Muslim elected to Bosnian presidency", *European Voice,* 4. 10. 2010

William A. Stuebner, „ Bosnia's SDP Sold Out to Forces of Darkness", *Balkan Insight*, 13. 9. 2013

<u>Treaties, resolutions and other official documents</u>

Agreed Measures between presidents Izetbegović, Milosević and Tudjman from 18. 2. 1996

European Commission, Joint Conclusions from the High Level Dialogue on the Accession Process with Bosnia and Herzegovina, MEMO/12/503, 27. 6. 2012

International Convention on the Elimination of All Forms of Racial Discrimination, 21. 12. 1965

UNSC Res 757 (30. 5. 1992), UN Doc S/RES/757

UNSC Res 808 (22. 2. 1993), UN Doc S/RES/808

UNSC Res 827 (25. 5. 1993), UN Doc S/RES/827

UN Charter, 24. 10. 1945, 1 UNTS XVI

Washington Agreement between Bosnia and Herzegovina and Croatia, signed on 1. 3. 1994

<u>Court practice</u>

Prosecutor v. Gotovina and Markač (Appeals Chamber Judgment), ICTY Case IT-06-90-A

Prosecutor v. Haradinaj, Balaj and Brahimaj (Retrial Judgment), ICTY Case IT-04-84*bis*-T

Sejdić and Finci v. Bosnia and Herzegovina, ECtHR App. nos. 27996/06, 34836/06 (Judgment), 22. 12. 2009

All references to online sources are cited as of March 31st, 2013.